

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991 CG Docket No. 02-278

Petition for Rulemaking of ACA
International

To: The Commission

COMMENTS OF CLARK COUNTY COLLECTION SERVICE, LLC

Introduction

Clark County Collection Service, LLC (“CCCS”) respectfully submits these Comments in support of the Petition for Rulemaking filed by ACA International (“ACA”) in the above captioned proceeding.¹ CCCS is a debt collection specialist licensed in twelve states and headquartered in Las Vegas, Nevada.

In its Petition, ACA asks the Federal Communication Commission (the “Commission”) to initiate rulemaking to modernize and update current Commission rules promulgated under the Telephone Consumer Protection Act (the “TCPA”). Of particular interest to CCCS is ACA’s requests that the Commission: “(1) confirm that not all predictive dialers are categorically automatic telephone dialing systems (“ATDS” or “autodialers”); (2) confirm that “capacity” under the TCPA means present ability; . . . and (4) establish a safe harbor for autodialed “wrong number”

¹ ACA International, *Petition for Rulemaking*, CG Docket No. 02-278 (filed Jan. 31, 2013) (“ACA Petition” or “Petition”); *see also*, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Rulemaking from ACA International*, Public Notice, CG Docket No. 02-278, Rpt. No. 2999 (rel. Feb. 21, 2014).

non-telemarketing calls to wireless numbers.” ACA Petition at p. 1-2. CCCS strongly urges the Commission to grant ACA’s Petition because businesses and other organizations need clarity on these critical issues.

A. The Commission Must Clarify that a Predictive Dialer is Only an ATDS Under the TCPA If It Meets the Statutory Definition of an ATDS

As ACA notes in its Petition, ATDS has a very specific definition under the TCPA: “equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (b) to dial such numbers.”² In recent years, this language has been stretched beyond the bounds of logic in an increasing number of class action lawsuits alleging violations of the TCPA. Collection agencies throughout the country are under siege from self-proclaimed consumer protection attorneys filing frivolous class action lawsuits for alleged violations of the TCPA with the allure of certain TCPA violation penalties ranging from \$500 to \$1500 per call, text, or facsimile.³ Some attorneys have gone so far as to allege that the TCPA is violated even when telephone calls are manually made, one at a time, with human intervention, merely because that telephone call is being made through a telephone system that has the “capacity” to place automated calls.⁴ As ACA aptly explains, “it is critical that the Commission confirm that simply because a predictive dialer *can be* an ATDS for purposes of the

² ACA Petition at p. 6; 47 U.S.C. § 227(a)(1); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 FCC Rcd 14014 ¶ 132 (2003).

³ See generally, Becca J. Wahlquist, *The Juggernaut of TCPA Litigation*, U.S. Chamber Institute for Legal Reform, October 2013 (discussing the TCPA’s over-incentivization of individual plaintiffs and class counsel to file claims with the allure of a \$500, or \$1500 if willful, penalty per call, text, or fax). A copy of this article is attached hereto as **Exhibit “A”**.

⁴ See *Bates, et al. v. Dollar Loan Center, LLC, et al.*, U.S. District Court, District of Nevada, Case No. 2:13-cv-1731-KJD-CWH (the “Bates Lawsuit”). A copy of the Complaint in that case is attached hereto as **Exhibit “B”**.

TCPA, this does not mean that a predictive dialer *must be* an ATDS under the TCPA.” ACA Pet. at p. 6.

Based on the Commission’s language in its 2003 and 2008 orders that a predictive dialer constitutes an ATDS subject to the TCPA’s restrictions on autodialers, as discussed in further detail below, unscrupulous class action attorneys are filing lawsuits against debt collection companies with increasing regularity. Debt collection companies are being forced to defend themselves against meritless TCPA violation claims brought by plaintiffs’ counsel. In the most egregious of cases, some “consumer protection” attorneys have resorted to placing advertisements on www.craigslist.com **to offer payment of money in exchange for witness testimony.**⁵ The bounds of decency have long since passed when the intent of the TCPA, to protect consumers from telemarketers, has digressed to attorneys engaging in cash-for-evidence schemes offering potential witnesses money for testimony regarding autodialing functions of telephone equipment.

It is imperative that the Commission clarify its treatment of dialers for the purpose of the TCPA. For example, many collection agencies use predictive dialers merely for the purpose of generating live telephone calls. In many cases, when a debt collector is contacting a debtor, a live operator, is already on the line listening as the dialer (which has the debtor’s contact information stored in its database) enters the digits into the telephone system to make the call, which rings on the other end. These are not “robocalls” by any stretch of the imagination. Such calls do not harm consumers in any way. Nor were such calls intended to fall within the prohibitions of the TCPA. Rather, the use of such technology merely eliminates operator “down time” between telephone calls and improves efficiency for the debt collector.

⁵ A copy of recent Craigslist advertisements seeking evidence to support claims of TCPA violations for payment of money in Las Vegas, Nevada are attached hereto as **Exhibit “C”**. Such postings were made *after* plaintiffs’ counsel filed a class action lawsuit against the referenced companies.

B. The Commission Must Confirm that “Capacity” Under the TCPA Means Present Configured Ability of Equipment As Used By The Calling Party.

CCCS agrees with ACA that the Commission must confirm that “capacity” for TCPA purposes means the **present configured ability** of a dialing system **as actually used by the calling party**, not the **hypothetical, theoretical capability of an autodialing function**. Amazingly, debt collectors are being subjected to potential TCPA liability for making live telephone calls placed manually through a dialing system that happens to have an autodialing function, even though the autodialing function is not even used for that particular call.⁶ In other words, some are claiming that a manually dialed call is an “automated” call merely because it has the “capacity” to make an auto-dialed call. This is, of course, a ridiculous allegation and a complete misinterpretation of the TCPA. Using the foregoing “logic,” anyone using a “smart phone” to autodial another person on their cell phone without their consent would be violating 47 U.S.C. § 227(b)(1)(A)(iii). Such a reading of the statute is absurd and, without confirmation from the Commission, collection agencies will continue to be forced to defend themselves against baseless class action lawsuits at great cost. Yet, said allegation has been made in at least one pending federal lawsuit (*see* Exhibit B) thus far.

Notably, the TCPA does not define the terms “capacity” or “using.” CCCS urges the FCC to clarify that the definition of an ATDS reflects equipment that has the **present configured capacity**, not merely the theoretical capacity to generate and dial random or sequential numbers without additional modifications, and that said capacity actually be used in the making a given telephone call when determining whether that call violates the TCPA. As ACA sets forth in its Petition, an ATDS under the TCPA is defined as “equipment which has the capacity – (A) to store

⁶ *See* Exhibit B.

or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”⁷ In 2003, the Commission ruled that some predictive dialers that do not use a random or sequential number generator are nevertheless ATDSs under the TCPA.⁸ In particular, the Commission ruled “to be considered an ‘automatic telephone dialing system,’ the equipment need only have the *capacity* to store or produce telephone numbers.”⁹ Understandably, the Commission reached this conclusion out of concern that technological changes had influenced telemarketers to use predictive dialers to call lists of numbers rather than to call random or sequential numbers.¹⁰ The Commission reaffirmed this position in a 2008 ruling.¹¹ Yet, the foregoing conclusion has been turned on its head in an attempt to create TCPA liability where none exists, and courts have little guidance at this point as to just how far the TCPA stretches.¹²

To address the exponential growth of lawsuits on this point, CCCS respectfully implores the Commission to take action. The Commission must clarify that “capacity” for TCPA purposes means the present configured ability that is used at the time the call is made, and that said “capacity” must actually be used (as opposed to manually dialed calls on a system with automated capacity).

⁷ 74 U.S.C. § 227(a)(1).

⁸ *In re Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014 ¶ 133 (2003).

⁹ *Id.* at ¶ 132.

¹⁰ *Id.*

¹¹ *In re Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 23 FCC Rcd 559 (2008).

¹² While the Ninth Circuit has considered the TCPA’s use of the word “capacity,” it has not defined that word as used under the TCPA. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009); *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2361 (2013). In a recent Washington case, a U.S. District Court held that telephone calls which rely on human intervention are not subject to the TCPA and thus are not actionable. *Gragg v. Orange Cab Co., Inc.*, No. C12-0576RSL, 2014 WL 494862 (W.D. Wash. Feb. 7, 2014).

C. The Commission Should Establish A Safe Harbor for Non-Telemarketing, Debt Collection Calls to “Wrong Numbers”

Finally, CCCS supports ACA’s request that the Commission establish a discrete safe harbor for non-telemarketing calls when a debt collector calls a “wrong number” for which a debt collector had previously obtained appropriate consent and had no intent to call any person other than the person who had previously provided consent to be called. As consumers have steadily transitioned away from land lines to the exclusive use of cellular telephones, CCCS agrees that a limited safe harbor is necessary to ensure that debt collectors do not face liability under the TCPA for placing non-telemarketing, non-solicitation autodialed calls to lawfully obtained numbers when such numbers are, unbeknownst to the debt collectors, subsequently reassigned to third parties. CCCS supports the new language proposed in the ACA Petition regarding delivery restrictions, which maintains protection for consumers as contemplated by Congress while also protecting debt collection companies that make telephone calls in good faith to telephone numbers they believe they have consent to call regarding debts. ACA Petition at p. 17.

CONCLUSION

CCCS strongly urges the Commission to issue a rulemaking on the foregoing points. Congress enacted the TCPA to prevent and punish automatic communications that were made without human intervention, not to punish calls made manually, one at a time, by a human being. Until the Commission provides clarification on predictive dialers, capacity under the TCPA, and safe harbors for autodialed “wrong number” non-telemarketing calls to wireless numbers, debt

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collection companies must continue to defend themselves against frivolous TCPA class action litigation.

Respectfully submitted,

By:

A handwritten signature in black ink, appearing to read "Mary P. Brennan", is written over a horizontal line.

Mary Brennan

Clark County Collection Service

Director of Operations

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